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Supreme Court, U.S.
FILED

No. 091565 JUN 15 2010

In The OFFICE OF THE CLERK

Supreme Court of the United States

MOHAMMED AFZAL,

Petitioner,

v.

PARK STREET TITLE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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Dated: June 24, 2010

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QUESTION PRESENTED

Justice Judith Macaluso of the Superior Court of the District of Columbia in rendering final judgment against petitioner stated –

> "I am going to be hard on Mr. Afzal... But what I am going, Mr. Afzal, is, also said with concern and a kind of sympathy... Mr Aasim testified that when Kristen Rickard called she wanted to know **whether Mr. Afzal is suffering from a mental condition. And, I am frank to say that based upon his behavior in this lawsuit that I have the same concern**".

The District of Columbia Court of Appeals held there was no plain error in the trial court's judgment. The District of Columbia Court of Appeals did not consider the above cited words in Justice Macaluso's Judgment as being plain error and prejudicial against petitioner. The District of Columbia Court of Appeals denied Motion to reconsider the judgment for violation of due process without reasons.

The question presented is whether Justice Macaluso's statement regarding petitioner's mental condition violated the Due Process Clause of the Fourteenth Amendment in that the judge gave an appearance of bias against petitioner; and whether in the interests of justice the judgment should be nullified and a new trial should be ordered before a non prejudiced judge.

LIST OF PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Rule 14.1(b), the following identifies all of the parties appearing here and before the District of Columbia Court of Appeals.

Mohammed Afzal is the petitioner here and was the appellant below.

Park Street Title, Inc. is the respondent here and was the appellee below.

Pursuant to this Court's Rule 29.6, Respondent Park Street Title has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mohammed Afzal, respectfully submits this petition for a Writ of Certiorari to review the judgment of the District of Columbia Court of Appeals affirming a judgment of the Superior Court of the District of Columbia.

OPINIONS BELOW

The Decision of District of Columbia Court of Appeals denying petitioner's appeal is not published, and appears in Appendix C to this Petition.

The Opinion of the District of Columbia Court of Appeals denying petitioner's Motion for Rehearing is not published, and appears in Appendix B to this Petition.

The unpublished written opinion of the Superior Court for the District of Columbia appears in Appendix A to this petition.

BASIS FOR JURISDICTION

The District of Columbia Court of Appeals Opinion was filed on November 24, 2009. District of Columbia Court of Appeals Opinion denying petitioner's Motion for Rehearing was filed on December 15, 2009. The District of Columbia Court of Appeals issued its Mandate on December 23, 2009.

This Court has jurisdiction to review the Judgment of District of Columbia Court of Appeals Opinions pursuant to **Title 28 U.S.C. § 1257(a)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> **No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . . U.S. Const. amend. XIV, § 1.**

STATEMENT OF THE CASE

This Petition is based on an extraordinary situation arising from the words of a judge uttered while rendering a final judgment. The words uttered are such words that reveals a judge's actual bias or prejudice toward a litigant. In the first paragraph of her final judgment, Justice Judith Macaluso of the Superior Court of the District of Columbia judgment stated –

> "I am going to be hard on Mr. Afzal... But what I am going, Mr. Afzal, is, also said with concern and a kind of sympathy... Mr Aasim testified that when Kristen Rickard called she wanted to know **whether Mr. Afzal is suffering from a mental condition. And, I am frank to say that based upon his behavior in this lawsuit that I have the same concern**".

The facts of the case are, in brief, respondent conducted a settlement regarding the sale of

petitioner's house. The closing took place on August 7, 2006. Respondent prepared a Settlement Statement that showed the amount due to petitioner was $439,643.25. Respondent paid to petitioner $216,018.27. Petitioner sued respondent for the balance of $223,634.98. Respondent asserted that he paid the balance of $223,624.98 to other persons pursuant to petitioner's instructions. **The challenge before the trial court was whether to believe petitioner or to believe respondent's witnesses.**

The trial judge stated that she believed that petitioner was suffering from mental condition. The question before trial judge became **whether to believe petitioner with mental condition or respondent's witnesses who were of sound mind.** As would be expected, based on the judge's expressed appearance of bias against petitioner, the trial judge chose to believe respondent's witnesses. She consequently entered judgment for respondent.

Petitioner appealed to the District of Columbia Court of Appeals challenging the trial court's impartiality and fairness. Petitioner argued that the trial court violated basic tenets of fair trial. Petitioner raised the issue regarding the trial judge's concern for petitioner mental condition. Petitioner argued who would believe a person with mental condition. Petitioner argued that it was unfair for trial to make assumption regarding his mental condition without giving him any chance to explain any circumstance that may have suggested to the judge petitioner's mental problem. Petitioner argued that it was a futile exercise for petitioner to expect justice from a judge who believed that petitioner was suffering from

a mental condition. Petitioner argued he was denied due process rights.

The District of Columbia Court of Appeals denied petitioner's appeal holding that there was no plain error arising from the trial judge's statement. Petitioner filed a Motion to reconsider the decision affirming the trial judge's judgment. In his Motion to reconsider, petitioner emphasized that his appeal was not about the weighing of evidence or determination of credibility of witnesses. He stated that the appeal was about the trial judge's bias and/or prejudice against petitioner. Petitioner cited the Supreme Court Opinion in **Caperton v. A.T. Massey Coal Co., Inc., No.08-22**, recognizing a trial judge's bias or prejudice against a party to a proceeding as a violation of Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The District of Columbia Court of Appeals denied the Motion without reference to the constitutional argument raised in the Motion.

REASONS FOR GRANTING THE PETITION

1. The Petition should be granted because it is in public interest that the U.S. Constitutional Provisions are enforced. The United States Constitution guarantees rights to all its citizens no matter how insignificant a person may be. Petitioner is a United States citizen. The Supreme Court is charged with ensuring redress for violations of the protected rights under the Constitution. The District of Columbia Court of Appeals failed to redress a

violation to a violation of Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. In **Caperton v. A.T. Massey Coal Co., Inc., No.08-22**, the Supreme Court recognized a trial judge's bias or prejudice against a party to a proceeding is a violation of Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner contends that the trial judge's statement indicated bias or prejudice against him –

> "I am going to be hard on Mr. Afzal... But what I am going, Mr. Afzal, is , also said with concern and a kind of sympathy... Mr Aasim testified that when Kristen Rickard called she wanted to know **whether Mr. Afzal is suffering from a mental condition. And, I am frank to say that based upon his behavior in this lawsuit that I have the same concern**

Mental condition bears on a witness's competence, ability to comprehend, know and correctly relate the truth. It is extremely prejudicial for a judge to believe that a party to a case suffers a mental condition. In the present case there was no testimony before the trial judge that petitioner suffered from mental condition or defect at any time. There were no mental health records introduced into court showing an 'impairment' of petitioner's ability to comprehend, know, and correctly relate the truth before the trial court. The trial court assumed role of a

mental-health expert in believing that petitioner had a mental condition. There is no case authority that empowering the trial judge to recognize the existence of a mental condition from a witness's demeanor.

It is axiomatic that a fair trial in a fair tribunal is a basic requirement of Due Process Clause of the Fourteenth Amendment to the United States Constitution. **In re Murchison, 349 U.S. 133, 136 (1955)**. A "neutral and detached judge" is an essential component of this due process requirement. **Ward v. Vill. of Monroeville, 409 U.S. 57, 62 (1972)**. Indeed, "even if there is no showing of actual bias" on the part of a judge, "due process is denied by circumstances that create the likelihood or the appearance of bias" because such a possibility of judicial impropriety creates a constitutionally unacceptable risk of actual impropriety. **Peters v. Kiff, 407 U.S. 493, 502 (1972)**.

Since the trial judge believed that petitioner was suffering from mental condition, the question before her became **whether to believe petitioner with mental condition or respondent's witnesses who were of sound mind.** The trial judge's belief created an unfair scale of justice that tilted in favor of respondent. Who in his right mind would believe a person with mental condition. Thus the trial judge's judges belief prejudiced petitioner.

In **Caperton v. A.T. Massey Coal C., Inc., No. 08-22**, the United States Supreme Court noted that 'If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult

to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, **though actual bias, if disclosed**, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

In the present case the trial judge openly revealed her prejudicial and biased belief that petitioner suffers from a mental condition. The trial judge's belief is underscored from the judge's statement "I am going to be hard on Mr. Afzal... But what I am going, Mr. Afzal, is, also said with concern and a kind of sympathy". The Judge's sympathy was presumably for petitioner's supposed mental condition. This is a kind of disposition that a fair minded person could not set aside when judging the dispute between petitioner and respondent. The trial judge raised petitioner's mental condition in context of credibility. No reasonable person would believe a person suffering from a mental condition. A judge's assumption that one is suffering from mental condition is one of the worst forms of bias or prejudice

a litigant can experience in court. Who can believe that the trial judge seriously considered petitioner's testimony in the light of the fact that the trial judge believed petitioner to be suffering from a mental condition. The trial judge's belief that petitioner was suffering from mental condition presents a real possibility of undermining a judge's neutrality. In this case the judge believed that respondent's witnesses were of sound mental condition whereas petitioner was suffering from a mental condition. In such circumstance it would seem natural for the judge to prefer evidence of witnesses in good mental condition as opposed to a witness suffering from a mental condition.

Every person is presumed to be sane. There is no evidence on record to suggest that petitioner had a mental condition. The trial judge could not have taken judicial notice of mental condition. Facts judicially noticed must be of a type which are susceptible to such notice. **Renard v. District of Columbia, 673 A2d 174 (1996)**. Mental condition is not susceptible to judicial notice. The trial court was not justified in assuming the role of a mental-health expert to the prejudice of petitioner's case.

The trial judge should have recognized that her belief that petitioner was suffering from a mental condition to be an influence so difficult to dispel that there was a real possibility of undermining her neutrality. The trial judge should have therefore withdrawn herself from the case. Under a realistic appraisal of psychological tendencies and human weakness, the trial judge's belief regarding petitioner's mental condition demonstrated actual

bias or prejudgment against petitioner that is forbidden if the guarantee of due process is to be adequately implemented.

In the premises considered the trial judge violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court of Appeals for the District of Columbia erred in failing to recognize the trial judge's bias as a violation of due process. The Supreme Court is the ultimate protector of Constitutional rights whether it be a small man or not. Petitioner has vested constitutional rights which have been violated to his detriment and loss.

3. The Petition should be granted so that "the appearance of bias test" enunciated in **Caperton v. A.T. Massey Coal C., Inc., No. 08-22** can be the basis for nullification of a judgment where a judge openly expresses an actual statement of bias against a litigant contrary to due process clause.

The facts pertaining to this Petition are unique and extraordinary. The facts are extreme by any measure. In this Petition, the trial judge openly declared her belief that petitioner was suffering from a mental condition. The trial judge was not mental-health expert and had no evidence to justify her belief regarding petitioner's mental condition. Mental condition bears on a witness's mental competence, ability to comprehend, know and correctly relate the truth. It is extremely prejudicial for a judge to believe that a party to a case suffers a mental condition. The belief nullifies the whole concept of a fair trial.

The trial judge's openly declared statement crossed constitutional limits requiring this Court's intervention because there was no fair trial. In **Caperton v. A.T. Massey Coal C., Inc., No. 08-22** the Supreme Court noted that actual bias, if disclosed, no doubt would be grounds for appropriate relief if the guarantee of due process is to be adequately implemented. There is a "presumption of honesty and integrity in those serving as adjudicators. However judges are humans that can err. The presumption does not apply where a trial judge's error is self evident and in plain view as presented in petitioner's case. Hence the Supreme Court cannot ignore the violation of due process merely on account of presumption of judges presupposed impartiality.

The facts pertaining to the Petition relate to an actual trial judge's statement that openly reveals bias against petitioner. An actual trial judge's statement revealing a judge's bias is sufficient basis for imposing a constitutional requirement under the Due Process Clause. The due process clause protects against express judicial improprieties. This Petition is not merely grounded on appearance of impropriety but an actual statement of bias. It is not all words demonstrating a judge's hatred against a litigant would qualify as revealing a judge's actual bias. A judge may actually hate a litigant but still be able to fairly evaluate the litigants testimony. Few words clearly demonstrates a judge's bias or prejudice against a litigant. Two classic phrases that would demonstrate a trial judge's bias or prejudice against a party to a case are –

"you guilty looking"
"you have a mental condition". "

You guilty looking "would demonstrate that the judge already believes a defendant to be guilty thereby rendering a nullity the presumption of innocence. The words "You have a mental condition", as is in present case, demonstrates that trial judge had a predisposition that petitioner could not be trusted to tell the truth. This is a violation of due process clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

[ENTERED: DECEMBER 15, 2009]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 09-CV-229

MOHAMMED AFZAL
Appellant.

v. CAR357-07

PARK STREET TITLE, INC.
Appellee.

BEFORE: Kramer and Blackburne-Rigsby Associate Judges, and King, Senior Judge.

ORDER

On consideration of appellant's motion for reconsideration and to vacate the judgment and the Opposition thereto, it is

ORDERED that appellant's motion is denied

PER CURIAM

Copies to:
Honorable Judith N. Macaluso
Alex Chanthunya Esquire
11228 Georgia Avenue, #4
Silver Spring, MD 20902

David B, Stratton *Esquire*
Mark H. Kopelman Esquire
1100Connecticut Avenue NW.
Suite 600
Washington DC 20036

APPENDIX B

[ENTERED: NOVEMBER 24, 2009]

DISTRICT OF COLUMBIA COURT OF APPEALS

District of Columbia
Court of Appeals

No. 09-CV-229

MOHAMMED AFZAL,
Appellant.

v. CA357-07

PARK STREET TITLE, INC.
Appellee.

BEFORE: Kramer and Blackburne-Rigsby, Associate Judges, and King, Senior Judge.

JUDGMENT

On consideration of appellee's motion for summary affirmance, appellant's notion for leave to file opposition out of time, the lodged opposition, appellant's brief, appellant's motion for leave to file appendix out of time, the lodged appendix, the opposition [hereto, appellee's motion to supplement the record and the record on appeal, it is

ORDERED that appellant's motion for leave to file appendix out of time is granted and the Clerk shall file the lodged appendix, it is

FURTHER ORDERED that appellee's motion to supplement the record is granted and the Clerk shall file the documents attached to the motion as a supplemental record. It is

FURTHER ORDERED that appellant's motion for leave to late file opposition is granted and the Clerk shall file the lodged opposition. It is

FURTHER ORDERED that appellee's motion for summary affirmance is granted. *Oliver T Carr Mgm't, Inc. v. Nat'l Deli.*, 397 A.2d 914, 915 (D.C. 1979) (standard for summary affirmance) *See also N.D. McN. v. R.J.H., Sr., 979* A,2d 1195, 1198 (D.C. 2009) (citing *United States v. Olano*, 507 U.S. 725, 732-34 (1993)) (Where there has been no objection at trial to an alleged error, as here, this court will usually apply plain error review and reverse only upon a showing that 1) there was error, 2) the error was obvious or plain, and 3) the error affected substantial rights.") and *Patton v. United States,* 633 A,2d 800, 820 (D.C. 1993) ([w]e defer to the fact finder's right to weigh lie evidence, determine the credibility of the witnesses, and draw inferences from the evidence . . ."). It is

FURTHER ORDERED and ADJUDGED that the judgment on appeal be and hereby is affirmed.

ENTERED BY DIRECTION OF THE COURT:

/s/
GARLAND PINKSTON, JR.
Clerk of the Court

Copies to:

Honorable Judith N. Macaluso

Clerk, Superior Court

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APPENDIX C

[ENTERED: FEBRUARY 5, 2009]

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

MOHAMMAD AFZAL,
Plaintiff,

Docket No. CA-357-07

vs.

PARK STREET TITLE INC.
Defendant.

February 5, 2009
Washington, D.C.

The above-entitled action came on for a hearing before the Honorable JUDITH N. MACALUSO, Associate Judge, in Courtroom Number A-50.

APPEARANCES:

On behalf of the Plaintiff:
ALEX CHANTHUNYA, Esquire
Washington, D.C.

On behalf of the Defendant:
DAVID STRATTON, Esquire
MARK KOPELMAN, Esquire
Washington, D.C.

VALARIE E. WILLIAMS 09-00633
Official Court Transcriber Telephone: 879-1757

PROCEEDINGS

THE DEPUTY CLERK: Calling the matter of Mohammad Afzal versus Park Street Title, Inc., civil action 357-07.

Parties stand and state your names for the record. (Pause) Parties stand and state your names for the record.

MR. CHANTHUNYA: Alex Chanthunya for the Plaintiff, Mohammad Afzal with me here.

THE COURT: Thank you.

MR. STRATTON: David Stratton on behalf of Park Street Title, and with me is Mark Kopelman.

THE COURT: Thank you.

Of course we're here for the Court to annunciate its judgment following trial in this matter. This is going to be a defense judgment. I'm going to be hard on Mr. Afzal. I'm going to say some things directly and disapprovingly. But, what I'm going to say. Mr. Afzal, is, also, said with concern and a kind of sympathy.

Mr. Aasim testified that when Kristen Rickard called she wanted to know whether Mr. Afzal is suffering from a mental, condition. And, I

am frank to say that based upon his behavior in this lawsuit that I have the same concern.

I cannot understand how a person who is thinking rationally could expect that a judge would believe him when his story is contradicted by six eyewitnesses, who have nothing to gain from their testimony, and from numerous documents corroborating what those six witnesses have to say, and his own story is corroborated by no other witness.

I don't think it is rational for Mr. Afzal to tell 'his story and expect to be believed. And, it's, also, not rational for him to threaten Mr. Aasim in graphic and really vile language just a few feet outside the door.

I read Mr. Afzal's affidavit. The time for challenging what Mr. Aasim had to say was in cross examination while he was on the witness stand. The trial is over, and that affidavit is absolutely not considered with respect to the credibility of the recitation concerning what Mr. Afzal did outside the courtroom on that day.

I, also, want to say that it's rare, for me, to say that any witness has lied. I'm not a human lie detector machine, and I don't pretend to me. Usually, I simply conclude that one witness is more convincing than the other. In ten years or so on the bench, I may have concluded that somebody is lying perhaps half a dozen times.

So, Mr. Afzal is a real exception. His lies were brazen, and they were obvious. I'll go through the record right now.

The record convincing establishes that Hr. Aflal received checks totaling his entire net proceeds due from the sale of 2130 0 Street, Northwest, Washington, D.C., on August the 7th of 2006. The testimony of Emily Copenhafer Silkander Aasim and Kirsten Rickard is eyewitness testimony; they described what they did and what they saw.

Their testimony is consistent in every important detail. It's not a hundred percent consistent I think it would be odd, and even suspicious if it were. But, in every important detail their testimony is consistent.

Mr. Aasim and Ms. Rickard testified that when a check for four hundred thirty-nine thousand dollars -- pardon me, four hundred thirty nine thousand sixty hundred forty-three dollars and twenty-five cents was presented to Mr. Afzal, he rejected it and asked for multiple checks.

He told Ms. Rickard whom he wanted the checks made out to and in what amounts in a sense through Mr. Aasim who helped Mr. Afzal create Defense Exhibit 1, the form that instructed Park Street Title on how to distribute the proceeds. Most of that writing on the form is Mr. Aasim's. He wrote it as he followed Mr. Afzal's instructions, and Mr. Afzal signed the form in front of Mr. Aasim.

Defense Exhibit 1 instructs that Park Street Title is to cut a check for twenty thousand dollars to Waseem Ahmad. Four checks each for twenty-five thousand dollars, to Malik A. Aslarm. Three checks, each for twelve thousand five hundred forty-one dollars and sixty-six cents, to Qadir Ahmed. And, five checks, each for nine thousand dollars, to Home Design HK. Mr. Afzal was to receive four checks in his own name totaling two hundred sixteen thousand and eighteen dollars and twenty-seven cents.

As a result of Mr. Afzal's request Ms. Copenhafer voided the large check and cut seventeen checks to distribute the total sum.

There is documentary evidence to support this testimony; Defense Exhibit 1, Defense Exhibits 2 through 20, and Defense Exhibit 32. They show the voided check and the newly created checks.

After Mr. Afzal made sure that he got all the checks he left, Ms. Copenhafer, Ms. Rickard and Mr. Aasim all saw Mr. Afzal receive the checks and leave. None of these three witnesses had any motive to lie that is even hinted at on the record.

Similarly, three individuals who are named payees on the checks testified that they received the checks from Mr. Afzal, and none of those persons has a motive to lie.

Malik Aslarm testified that he was introduced to Mr. Afzal by a mutual friend, Nyam (phonetic). Mr. Aslarm had seen Mr. Afzal a few times at a

Mosque or at his grocery store in Virginia but did not know him except to say hello to Mr. Aslarm testified that he drove from his home in Wilmington, Delaware to the home of his good friend Nyam in Baltimore, Maryland to meet Mr. Afzal. Mr. Afzal handed Mr. Aslarm four checks, each for twenty-five thousand dollars, and each made out to Mr. Aslarm.

Mr. Afzal told Mr. Aslarm that he wanted Mr. Aslarm to cash the checks for him as a favor. And, Mr. Aslarm agreed to do that. He deposited all four checks into his account at Commerce Bank. After the checks cleared, he withdraw the funds in cash, drove down to Baltimore and handed over one hundred-thousand dollars in cash to Mr. Afzal. Mr. Aslarm's bank records corroborate his testimony, as do the checks themselves.

Mr. Aslarm did not get a commission for cashing the check. He testified, I did it because I'm a good person. I'm very close to Mr. Nyam. It was a favor.

Waseem Ahmed testified that he knows Mr. Afzal from seeing him at his grocery store and talking a few times. Usually through a mutual friend, Mr. Assad. Mr. Ahmed is a used car salesmen. And, in August, 2006, Mr. Afzal gave him a twenty thousand dollar check with Mr. Ahmed as the payee. The check was to be used to purchase a cargo van at an auction that day.

Mr. Ahmed deposited the check in his Bank of America account a few minutes after getting the check. As it turned out, Mr. Afzal did not buy a

vehicle, and Mr. Ahmed returned the money about a month after depositing it.

Mr. Afzal and Mr. Assad requested that the money be returned in cash so that is what Mr. Ahmed did. Mr. Ahmed's testimony is corroborated by his bank records, and by the check itself.

Hristo Kovachev testified that Mr. Afzal called him about fixing an extensive water leak problem at 2130 O Street, Northwest. The agreed upon price was forty-five thousand dollars with nine thousand dollars paid upfront. Mr. Kovachev got the first check on August 11th, 2006. Started the job August 12th, and completed it in November, 2006. Mr. Afzal was living in the basement of the property at the time- And, in the course of doing the work, Mr. Kovachev saw him many times and sometimes talked to him.

Mr. Kovachev was paid in separate nine thousand dollar checks as the work progressed. Mr. Afzal gave him the first check with the others checks coming through the mail.

Mr. Kovachovs testimony is corroborated by his bank records, and the checks themselves. The testimony of all three of these men, of course, is, also, corroborated by the testimony of the first three witnesses I referred to.

Mr. Afzal was represented by counsel at these depositions that -- that concerned the three payees of the checks, who testified through deposition and his attorney aggressively cross-examined the deponents.

Mr. Ahmed withstood cross-examination stoutly, stating that Mr. Afzal looked different from the man who gave him the check, because at that time Mr..Afzal was slimmer and did not have a beard.

After being confronted with questions from Mr. Afzal's counsel about whether he knew the consequences of lying, Mr. Ahmed said, "I'm not afraid of telling the whole truth. I'm right here in front of you."

Similarly, Mr. Aslarm, similarly challenged shot back, 'Why bring up perjury? You don't need to tell me that, boss- I mean, I already know. Are you calling me a liar? I'm willing to come to court to D.C. if it is necessary." The spirited rejoinders of these witnesses buttresses -- or buttress, I should say, their credibility.

What can Mr. Afzal possibly say in the face of all of this corroborated eyewitness testimony? He testified that Ms. Rickard told him he could not get the entire net proceeds all at once. That the amount was too big. And, their rules and regulations said that he could get the rest after -- I think it was two weeks, After same delay of time.

I understand that certain sums were held in escrow, but that is not what Mr. Afzal was talking about. He was testifying about the difference between two hundred sixteen thousand eighteen dollars and twenty-seven cents, and the four hundred thirty-nine thousand six hundred forty-

three dollars and twenty-five cents. That's what he was testifying about.

Not only is his testimony contradicted by the extensive witness and documentary evidence that I've just gone over, but his testimony doesn't make sense on its face.

A judge, just like members of the jury brings to the task of finding the facts, life experience and common sense. Like many members of the public, this judge has been through closings, and I know that the net proceeds from sale are paid out at closing. No rules and regulations have been provided to the Court supporting Mr. Afzal's testimony that sums over two hundred sixteen thousand and eighteen dollars and twenty-seven cents were too big. And, I believe that it was actually three months, and could not be paid out until three months later.

So, the statement that payment rejected because it's against the weight of the evidence. It's, also, contrary to common sense and the fact finder.

Mr. Afzal testified that Defense Exhibit 1, the form that instructs Park Street Title how to distribute the did not contain the instructions on the first four he signed it. That is to say the name of each how many checks were to be cut in the name of that the amount of each check.

Again, this testimony is against the weight of the evidence. And, again, it doesn't make common sense.

Mr. Afzal would have the fact finder believe that he, an experienced business man, would sign a completely blank form that states it is an agreement as to the distribution of proceeds. His testimony is rejected because it's against the weight of the evidence, and defies common sense.

Mr. Afzal testified that he did not know any of the people whose names appear on the checks. "I did not know any of those persons. I swear I do not know them." This testimony is impeached by the testimony of those who received the checks, all three of whom whose deposition testimony has been introduced into evidence testified that Mr. Afzal gave them the checks in-person.

His testimony is, also, impeached by the fact that his face turned a deep shade of red when he told that particular lie. At least three shades darker than his usual complexion. The other time his face turned deep red was when he testified that he did not ask anyone to make out a check in the name of Home Design HK.

I don't regard a suddenly flushing face as indicating a lie, ordinarily. And, I certainly don't regard it as indicating a lie all by itself. But, I do regard it as corroborative of lying given the extensive other evidence in this record.

He testified that he did not receive thirteen checks to take with me, or envelopes to take with me. Again this testimony is impeached by other evidence.

Perhaps Mr. Afzal was playing games with language. He didn't receive thirteen checks because he received seventeen checks. But, if that is a game, the language game will not work. Because if a person received seventeen check, they, also, received thirteen checks.

He testified that he never told Mr. Aasim to write 'any names on any document. Never refused a check of four hundred thirty-nine thousand dollars, plus. Never saw Mr. Kovaohev after he sold the house. Had never seen Waseem Ahmed before Mr. Ahmed's deposition in Baltimore. These flat denials are shown -- are shown to be false by overwhelming evidence in the record that I have referred to. As though the evidence in the record were not enough, Mr. Afzal, himself was shown to give inaccurate or untruthful testimony in other respects. In his deposition he testified that he hadn't been a party in one other lawsuit, and there had never been a civil judgment against him.

The truth is that he had been involved in four other lawsuits, and there had been four judgments against him. Two of the judgments occurred in 2006. One in 2007. In the 2007 judgment Mr. Afzal filed a motion to vacate which was even pending at the time of the deposition.

On this record the Court concludes that Mr. Afzal deliberately lied when he testified there had been only one other lawsuit against him with no judgment being entered.

Mr. Afzal was confronted with a phone record showing a 16-minute call on November 11th 2006, from Waseem Ahmed's phone to Mr. Afzal's phone. This was significant in light of Mr. Afzal's testimony that he had never seen Waseem Ahmed before Mr. Ahmed's October 1, 2008, deposition. In what the Court regards as a desperate attempt to explain away the call, Mr. Afzal testified that the call must have been from Sikander Aasim. That Mr. Aasim wanted to use different numbers. He never used his own phone number.

Mr. Afzal was at Mr. Ahmed's deposition. Perhaps he forgot that Mr. Ahmed testified that he doesn't know Sikander Aasim, and doesn't usually lend out his phone.

Mr. Afzal was asked at his deposition if he'd ever used a Virginia address for any purpose. He said, no. In fact, he did use a Virginia address. He used it for the purpose of a holdback agreement, which is Defense Exhibit 40. Mid, this is another indication that his testimony cannot be relied upon.

Another example of unreliable testimony is his saying at trial that he refinanced O Street a couple of times. As cross examination continued, Defense Exhibit 55 was produced to show that he refinanced the property eight times.

Mr. Afzal's presentations throughout this case has been a flat stonewalling denial. To say that it is unconvincing is an understatement. Mr. Afzal bears the burden of proving his case by a preponderance of the evidence. And, the contrary has occurred.

Defendant, Park Street Title, has proven that Mr. Afzals case is built upon lies beyond a reasonable doubt.

I issue judgment against Plaintiff, and for Defendant on all issues raised by the complaint.

And, that brings us to the Rule 11 question. I have not read any portion of the Rule 11 documents so that the fact finder would not be influenced by anything that was said in the Rule 11 document. Nor, have I read the opposition to the Rule 11 document.

And, so, I need to ask, and I suppose I'll be asking you, Mr. Stratton, if the procedure was followed as is set forth in the rule, for the motion to be sent to the Defendant at least twenty-one days before the motion was filed?

MR. STRATTON: Yes, Your Honor, it was.

THE COURT: And, do you have documentary evidence to support that?

MR STRATTON: Ahh --

THE COURT: And and it was -- was that documentation attached to your motion?

MR. STRATTON: There is a certificate of service

THE COURT: All Right.

MR. STRATTON: - - attached to the motion.

THS COURT: And tell me where I can find it and I'll take a look at it.

MR. STRATTON: It's Page 3.

THE COURT: All right. Just a moment, please.

(Pause,)

THE COURT; Page -- Page 3 of the motion ıtself?

MR. STRATTON: Yes, Your Honor.

THE COURT: All right.

(Pause.)

THE COURT: What I need to understand is whether thıs motion was served on Mr. Chanthunya at least twenty-One days before it was filed in court.

MR. STRATTON: Yes, Your Honor.

THE COURT Okay. So, it was mailed to Mr. Chanthunya on September the 9th, 2008? Am I rıght?

MR. STRATTON: Yes, Your Honor.

THE COURT: Okay. And, it was filed in

court on what day? October the 15th, 2008. No -- I don't know. When was it filed in court?

MR. STRATTON: Sometime in October, Your Honor. I don't have --

THE COURT: Okay. But, at least twenty-one days later?

MR. STRATTON: Yes.

THE COURT: All right. Okay.

So, we are indeed going to reach the Rule 11 question and it's a bit complicated. There's going to be a Rule 11 hearing, but I believe that other steps are going to occur first. The motion seeks a money judgment against Mr. Afzal, and, also, against Mr. Chanthunya. If I find that Mr. Chanthunya did not, after a reasonable inquiry, have a reasonable belief that Mr. Afzal's claims as expressed in Mr. Chanthunyas writings had or where likely to have evidentiary support, I have the power to award reasonable attorneys fees and other expenses to the Defendant, as well as order payment of money as a penalty.

If I find that Mr. Afzal did not have a reasonable belief that his factual contentions have or where likely to have evidentiary support I can impose the same sanctions on him. And, all of this means that the interest of Mr. Afzal and Mr. Chanthunya may be adverse to each other.

Mr. Chanthunya, you may have a conflict of interest that prevents you from representing Mr. Afzal in a Rule 11 hearing, And, Mr. Afzal you may need to get another lawyer to represent you. You may need a psychiatrist or a psychologist to examine you and to testify that you have a mental illness or other problem that caused you to act as you did.

So, I do need to set a schedule for a Rule 11 hearing. And, I think the first item on that schedule needs to be an ascertainment of counsel hearing so that I can find out what the determination has been by Mr. Chanthunya and Mr. Afzal with respect to lawyering.

Mr. Chanthunya you may very well want to get your own lawyer to present your case.

MR. CHANTHUNYA: Your Honor, I don't have the means to have another lawyer. I would.

THE COURT; All right.

MR. CHANTHUNYA: -- represent myself.

THE COURT: Okay. I will say, Mr. Stratton, to you, that it may be difficult for me to grant the Rule 11 motion without a specific transcript to be able to refer to at various points. Of course, the cost off a transcript can be an aspect of damages requested by the Defendant.

The Defendant's cost in preparing for and attending the Rule 11 proceeding and ordering the transcript are expenses that are likely to be billed to

Mr. Chanthunya and Mr. Afzal if the Defendant wins the Rule 11 motion. So, there may be an interest in settling the Rule 11 question, while expenses can be avoided and not going to a hearing. But, I leave that to you folks to talk to each other about. So, I am thinking that the next date would be in about three weeks, and would be an ascertainment of counsel date. After that, I would set a date for the tiling of an opposition to the Rule 11 motion. I know that a responsive filing has been made, but I think the record is much more extensive now than when the Rule 11 motion was filed. And so, I would schedule an additional opportunity for the filing of an opposition to the Rule 11 motion.

I would, also, at the next hearing, schedule a date for Defendant to file a reply. And, I would schedule some kind of a status hearing because there has to be a discussion about how many witnesses are going to be called, whether there's going to be expert witness testimony by a psychologist or a psychiatrist, and so on.

So, that's by way of overview. But, the next date will be an ascertainment of counsel date in about three weeks.

Mr. Chanthunya, you should, of course, advise your client to his rights to appeal. He does have a right to appeal, and please discuss that with him.

All right. Just a moment, please.

(Pause).

THE COURT: I think it would be convenient for the Court to have an ascertainment of counsel hearing on February the 27th. That would be part of the 9:30 calendar call. Is there any difficulty with February the 27th? And, we will be setting dates at that time in addition to do to determining whether either party will be represented by an attorney. (Pause.) All right. Not hearing any objection then, the next date will be February the 27th, this Courtroom, on this Court's 9:30 calendar.

Everyone is excused. Thank you.

MR. STRATTON, Thank you, Your Honor.

MR. CHANTHUNYA: Thank you, Your Honor.

Thereupon, the proceedings were concluded-)

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I, VALARIE S. WILLIAMS, an Official Court Transcriber for the Superior Court of the District of Columbia, do hereby certify that in my official capacity I prepared from electronic recordings the proceedings had and testimony adduced in the matter of; MOHAMMAD AFZAL vs. PARK STREET TITLE, Docket Number: CA-357-07, in said Court, on the 5th day of February, 2009.

I further certify that the foregoing 18 pages were transcribed to the best of my ability from said *recordings*.

In witness whereof I have subscribed my name this the 19th day of February, 2009.

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